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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 15 2003
LIN 02 215 51820

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. He certified the decision to the Administrative Appeals Office (AAO) for review under 8 C.F.R. § 103.4. The certified decision will be affirmed and the petition denied.

The petitioner is a registered nurse staffing firm. It seeks to employ the beneficiary permanently in the United States as a registered nurse. The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the proffered wage at the priority date. The priority date for Schedule A occupations is established when the I-140 is properly filed with the Bureau (formerly the Service). 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is June 20, 2002. The beneficiary's salary as stated on the labor certification is $18 per hour or $37,440 per year.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage at the priority date and of the petitioner's compliance with requirements to qualify the beneficiary as a Schedule A nurse.

In a request for evidence dated October 29, 2002 (RFE), the director required the 2001 federal income tax returns and the most recent Employer's Quarterly Federal Tax Form (Form 941) of the petitioner and Therapy Management Services, Inc. (TMSI). The RFE required specific details, especially, of a line of credit for $3,000,000.

The record already contained an offer of proof with the I-140, from SouthTrust Bank in a letter dated March 7, 2002 (Gage letter 1), stating:

> ... [the petitioner] has an established relationship with SouthTrust Bank. Currently, the company has access to working capital in the amount of $3,000,000.00 through an approved credit facility. The extension of this facility was based on an analysis of the company's detailed business plan, and established financial infrastructure provided through [M.M. and JM's] mutual ownership of both [the petitioner and TMSI].
>
> We are confident this facility will provide [the petitioner] the necessary resources for the immigration of foreign nurses.

In response to the RFE, the petitioner submitted the 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation, for the petitioner and TMSI, as well as the petitioner's quarterly wage and tax filings for the federal government and four States. The federal tax returns reported an ordinary loss for the petitioner, ($15,389), and a deficit of net current assets, less than the proffered wage. TMSI reflected ordinary income of $3,252,875 and net current assets of $3,398,094, more than the proffered wage.

A letter from the petitioner's accounting manager, dated December 5, 2002 (petitioner's projection 1), anticipated that petitioner would pay the prospective employee, when she came, $19 per hour for 2080 hours, a rate of $39,520 per year, plus health benefits at 20%, or $7,904 more, for a total of $47,424 annually. The petitioner's projection 1 postulated a billing of $49 per hour to an unknown hospital to produce prospective revenue of $101,920, for a difference of $54,496, the petitioner's presumed gross profit.

The director noted the reference in Gage letter 1 to an

unidentified third party facility's extension of credit and weighed the petitioner's business plan and projection. The director determined that no offer of proof met the requirements of evidence of ability to pay the proffered wage at the priority date, set forth in 8 C.F.R. § 204.5(g)(2), denied the petition, and certified the case to the AAO on March 7, 2003.

On appeal, the petitioner submitted additional evidence, namely, 2000 and 2001 Forms 1040, U.S. Individual Income Tax Returns and personal financial statements, of MM, JM, and another, JBB. 8 C.F.R. 103.4(a)(2).

SouthTrust Bank, also, described its inquiry into the security for the line of credit with another letter dated January 17, 2003 (Gage letter 2):

> These visits also provided an understanding of [the petitioner's] organizational infrastructure, and how the shareholders experience with [TMSI], would provide advantages such as economies of scale.
>
> To summarize, with the company's well defined business plan, well positioned staff and the owners 20 years of industry experience, SouthTrust Bank is prepared to approve additional credit extensions upon request from the directors of [the petitioner].
>
> Security of this facility is based on the assets and operating performance of [the petitioner], and the personal guarantees of its owners, [MM and JM]. Specifically, SouthTrust Bank has a first position UCC [Uniform Commercial Code] lien on all accounts receivable of [the petitioner]. [MM and JM] each personally guaranty [sic] 50% of any outstandings [sic] under the facility….

The petitioner concedes, on appeal, both that it would again show a loss in 2002 and that the personal wealth of MM, JM, and JBB is the security for the line of credit. *See* the petitioner's letter dated March 25, 2003 (petitioner's projection 2). Gage letter 2 recites that the security is based on the assets and performance of the petitioner.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Petitioner's projection 2 persisted, however, that the financial

solvency of its owners and lending institutions proved its ability to pay the proffered wage. The petitioning corporation's reliance on income and assets of TMSI, MM, JM, JBB, and SouthTrust is misplaced. Contrary to the basic assumption, the Bureau may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner tendered unaudited financial statements in the petitioner's projection 1 and 2 and Gage letters 1 and 2, such as the business plan, to establish the ability to pay the proffered wage at the priority date. They are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), *supra*, p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. Financial inquiries, described in Gage letters 1 and 2, effect no entry on any audited financial document or tax return at the priority date.

The petitioner's ordinary loss of ($15,389), as shown on the 2001 tax return, and its quarterly returns and wage and tax registers for 2002, do not establish income or assets from which to pay the proffered wage to the beneficiary at the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The petitioner's projection 1 envisions gross profits of $54,496 per year from the beneficiary's work after she arrives in the United States. The vision of future gross profits does not satisfy the proof required in these proceedings. Not only does the regulation refer to the priority date, it relies on net

income, not gross profits. These proceedings show no ordinary income at the priority date.

In determining the petitioner's ability to pay the proffered wage, the Bureau will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Bureau had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp. at 1084. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

After a review of federal tax returns, quarterly wage and tax registers, the petitioner's projections 1 and 2, and the Gage letters 1 and 2, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The certified decision will be affirmed and the petition denied.